

APPENDIX II-K

COVER SHEET FOR EMERGENCY RULE

Document Number _____	Rule Number <u>He-E 806.31(k)</u>
1. Agency Name & Address: NH Dept. of Health & Human Services 129 Pleasant Street Concord, NH 03301	2. RSA Authority: <u>RSA 161:4-a,VI(a)</u> 3. Federal Authority: <u>§1902(a)(13) of the Social Security Act; 42 CFR 447</u> 4. Type of Action: Adoption _____ Amendment <u>X</u> Repeal _____
5. Date of Filing: December 7, 2018	

6. Short Title: **Nursing Facility Reimbursement- Budget Adjustment Factor**

7. Contact person for copies and questions:

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****PLEASE ATTACH THE FOLLOWING**, numbered to correspond to the numbers on this sheet (a separate sheet is not required for every item):

8. An explanation of the nature of (a) the imminent peril to public health or safety, demonstrating that the emergency rule is necessary to prevent the imminent peril, or (b) the substantial fiscal harm to the state or its citizens which could otherwise occur if the rule were not adopted as an emergency rule.

9. A summary of the effect if the rule were not adopted.

10. A description of those affected.

***PLEASE SUBMIT 2 COPIES OF THIS COVER SHEET** and all attachments along with 2 copies of the emergency rule to the Office of Legislative Services, Administrative Rules.

****PLEASE SIGN THE FOLLOWING:**

I, the adopting authority,* hereby certify that the attached is an accurate statement explaining why an emergency rule is necessary.

Date: **December 7, 2018**

Signature: _____

Name: **Jeffrey A. Meyers**

Title: **Commissioner**

*("Adopting authority" is the official empowered by statute to adopt the rule, or a member of the group of individuals empowered by statute to adopt the rule.)

8. An explanation of the nature of (a) the imminent peril to public health or safety, demonstrating that the emergency rule is necessary to prevent the imminent peril, or (b) the substantial fiscal harm to the state or its citizens which could otherwise occur if the rule were not adopted as an emergency rule.

He-E 806 describes the requirements and methodology for reimbursing nursing facilities under the Medicaid program. The Department of Health and Human Services (Department) proposes to change the budget adjustment factor from 28.76% down to 26.82%.

The Department previously amended He-E 806.31 effective 12/23/2017, through interim rulemaking (followed by regular rulemaking, effective 6/29/2018) to remove the reference to a budget neutrality factor which was a variable percentage, and to specify a fixed budget adjustment factor (BAF). That interim rulemaking was necessary to conform with amended provisions to the Medicaid state plan when the Centers for Medicare and Medicaid Services (CMS) determined that the requirements of 42 CFR 447.252(b) could only be met by setting a fixed BAF in the Medicaid state plan. However, the BAF does not account for what the NH legislature budgeted as the previous methodology (budget neutrality factor) did.

The Department needs to adjust the BAF from 28.76% to 26.82% through emergency rules because the rates are being calculated for January 1, 2019 and if the Department adjusts the rates using the current BAF of 28.76% in the administrative rule, it will result in substantial fiscal harm to the providers. Nursing facility acuity rate setting is performed twice a year, for January and July, and since the rates must be adjusted in January, regular rulemaking would not be completed in time for the rates to be effective January 1, 2019. The Department did not realize the BAF would need to be adjusted until after the cost reports were provided by the nursing facilities and audited and reviewed in mid-November by the Department.

The Department is proposing emergency rulemaking to change the BAF because the requirements for interim rulemaking found at RSA 541-A:19, I.(c) are not met in that the onus of the proposed rulemaking is not a federal requirement. Rather, emergency rulemaking is needed to prevent substantial fiscal harm to the nursing facilities and the clients served, and to ensure compliance with the legislative mandate found at Chapter 155, Laws of 2017, effective 7/1/2017, which provided a rate increase and stated in a footnote: "The appropriation in class 504 reflects a caseload assumption of 4,100 in each year of the biennium and includes \$3,200,000 in SFY18 and \$8,920,000 in SFY19 to provide a rate increase for nursing home services." With the approval of the above language in Chapter 155, Laws of 2017, the legislature's intent was that the providers would get an increase in their rates. Applying the current BAF will result in a rate decrease which is against the legislative intent, and more importantly some providers will sustain substantial fiscal harm which could lead to their closure. The average decrease each individual nursing facility provider will see is approximately \$93,000 with a total loss of \$6.6 million for all facilities; however, some individual nursing facilities will see a rate reduction of approximately \$400,000. A decrease in nursing facility rates of this scope will cause major disruption among the industry and some facilities may close operations and/or refuse to take Medicaid patients which is problematic because nursing facility services are a considered mandatory service under the Medicaid state plan per 42 U.S.C. 1396d. Based on the FY 2019 appropriation for nursing facilities in the NH Budget, which included an increase for the providers, a BAF of 26.82% is required and will result in a modest average increase of \$0.17 which is within the amount appropriated in the class line.

While there is no public hearing for emergency rulemaking, the Department will enter into regular rulemaking to adjust the BAF, and the Department will be submitting an amendment to the Medicaid state plan to adjust the BAF in the state plan which will also require a public hearing.

9. A summary of the effect if the rule were not adopted.

As indicated above, if the Department were to apply the current BAF of 28.76% some providers will sustain substantial fiscal harm which could lead to their closure. The average decrease the providers will see is approximately \$93,000; however, some county nursing facilities will have a rate reduction of approximately \$400,000. A decrease in nursing facility rates of this scope will cause major disruption among the industry and some facilities may cease to operate or refuse to take Medicaid patients.

10. A description of those affected.

These rules affect nursing facilities receiving reimbursement under Medicaid.

CHAPTER He-E 800 MEDICAL ASSISTANCE

PART He-E 806 NURSING FACILITY REIMBURSEMENT

Amend He-E 806.31(k), effective 6/29/2018 (Document #12566), cited and to read as follows:

He-E 806.31 Methodology for Determining the Per Diem Rate.

(k) Facility-specific per diem rates shall be calculated as follows:

- (1) The per diem cost components shall be summed to obtain the total facility rate per diem for each resident in the nursing facility as of a date specified by the department;
- (2) The resulting rate shall be paid to the nursing facility until rates are updated with new MDS data upon rebasing, at which time the rates for all residents are summed and divided by the total number of residents in the facility; and
- (3) These rates shall be reduced by a budget adjustment factor equal to ~~268.8276~~268.8276% in accordance with the Medicaid State Plan.

APPENDIX

RULE	STATE OR FEDERAL STATUTE THE RULE IMPLEMENTS
He-E 806.31(k)	RSA 161:4, VI(a), RSA 541-A:7; Section 1902(a)(13) of the SSA